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In the Supreme Court of the United States

OCTOBER TERM, 1978

SAHARA-TAHOE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6-15) is reported at 581 F. 2d 767. The decision and order of the Board (Pet. App. 16-100) are reported at 229 N.L.R.B. 1094.

JURISDICTION

The decision of the court of appeals was handed down on September 8, 1978. A timely petition for rehearing was denied on November 27, 1978 (Pet. App. 5). The judgment of the court of appeals was then entered on December 5, 1978 (Pet. App. 1). On February 16, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 23, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that petitioner violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with the union without having a reasonably based good-faith doubt of the union's continued majority support among its employees.

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer–
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), provides in part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges * * * and containing a notice of hearing * * *: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *.

STATEMENT

1. Petitioner operates a hotel, bar, restaurant and gambling casino in Stateline, Nevada (Pet. App. 30-31). In 1965 petitioner became a member of the Reno Employers Council (the "Association"), an association of employers engaged in casino and related businesses. The Association represents its members in collective bargaining with various unions, including Hotel-Motel-Restaurant Employees and Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (the "Union") (Pet. App. 31-32). When petitioner joined the Association, it became a party to the existing 1962-1965 collective-bargaining agreement between the Union and the Association. In doing so, petitioner recognized the Union as the representative of its bar and culinary employees (Pet. App. 67-68). When the 1962-1965 bargaining agreement expired, petitioner continued its membership in the Association and thus remained a party to successive Union-Association contracts through 1974 (Pet. App. 18, 68).

On August 2, 1974, however, petitioner announced its timely withdrawal from membership in the Association and notified the Union that it would bargain with it on an individual basis for a future contract (Pet. App. 18, 78). Two months later, however, petitioner refused the Union's request to bargain on an individual basis, claiming that it doubted that the Union represented a majority of its bar and culinary employees (Pet. App. 78-79).

2. Unfair labor practice charges were then filed by the Union. The Board concluded that petitioner had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain

with the Union without having a reasonably based good-faith doubt of the Union's continued majority support among its employees (Pet. App. 17, 24).[1]

Relying on its decision in *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget*, 227 N.L.R.B. 357 (1976), enforced, 584 F. 2d 293 (9th Cir. 1978), petition for cert. pending, No. 78-1379, the Board held that petitioner's voluntary recognition of the Union established a presumption that the Union possessed the majority support of petitioner's employees and that this presumption survived petitioner's withdrawal from the multi-employer bargining unit (Pet. App. 18 n.9). In light of this presumption, the Board concluded that petitioner was not entitled to withdraw recognition from the Union unless it could establish that the Union in fact no longer represented a majority of the employees or that petitioner "had a reasonable doubt as to the Union's continuing majority status" (Pet. App. 17-18). The Board determined that the evidence relied on by petitioner to establish a reasonable doubt of majority status was insufficient "because of the speculative and subjective nature of the information on which [petitioner] based its calculations of union strength and because the circumstances, standing alone or in their totality, in no way reflect or even purport to

[1]The Board also found that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to make available to the Union, upon request, a list of employee names and addresses needed by the Union for the proper performance of its representative duties (Pet. App. 24).

reflect the sentiments of a majority of [petitioner's] employees on the question of union representation" (Pet. App. 19).[2]

[2]In asserting its doubt as to the Union's continuing majority support, petitioner relied on the following evidence: the relative inactivity of the Union prior to June 1974; inquiries from a small number of employees indicating that they did not know they were already represented by the Union; a high employee turnover rate; newspaper articles indicating low Union membership in the Tahoe-Reno area generally; and casual remarks made by a representative of another union and a Board agent to the effect that the Union represented only 5% or 20% of the employees in the Tahoe-Reno area generally.

The Board concluded that, even considering the cumulative weight of this evidence, it was inadequate to establish a reasonably-based doubt of continuing majority status. Concerning the Union's relative inactivity prior to June 1974, the Board found that there was not "a single instance where the Union failed to represent an employee properly or where an employee expressed dissatisfaction because the Union failed to represent him" and that inactivity may thus indicate no more than a harmonious work situation (Pet. App. 19-20). As to the employee inquiries, the Board found that "only a small percentage of * * * employees spoke to [petitioner] about the Union" and that their inquiries "at most, show that [they] did not know that the Union already represented [them] and * * * not * * * that they did not want the Union to represent them" (Pet. App. 21). With respect to the high rate of employee turnover, the Board noted that, under established precedent, if there is no "independent evidence from which it may be inferred that * * * new employees [do] not want the Union to represent them, * * * new employees are presumed to support a union in the same ratio as those * * * they replaced" (Pet. App. 21). The Board rejected petitioner's reliance on the newspaper reports because "they dealt with industry conditions in the Tahoe-Reno are a generally rather than with the situation in the *unit* of [petitioner's] employees" and because "the articles dealt with union *membership* rather than union *support*" (Pet. App. 22; emphasis in original). Finally, the Board found the remarks of a Board agent and a representative of another union unpersuasive because, "[l]ike the newspaper reports, these two individuals described industry conditions in the Tahoe-Reno area" (Pet. App.

3. The court of appeals upheld the Board's decision and enforced its order. Relying on its prior decision in *Tahoe Nugget, supra,* 584 F. 2d at 303, the court held that the presumption that the Union represents the majority of the employees is based on petitioner's voluntary recognition of the Union. The court found it unnecessary to determine whether petitioner's initial voluntary recognition of the Union in 1965 was unlawful because it allegedly had been entered into before petitioner hired any employees; the court noted that petitioner "was a party to a series of successive agreements all of which granted voluntary recognition to the Union *after* the Hotel had hired food and beverage employees" (Pet. App. 11; emphasis in original). The court then concluded that there is substantial evidence to support the Board's finding that petitioner had failed to establish a good faith, reasonable doubt as to the Union's continuing majority status (Pet. App. 13-15).[3]

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23). The Board pointed out that neither person "had any personal knowledge of the Union's support among [petitioner's] employees" and that their "offhand opinions based on multiple hearsay have little or no probative value" (Pet. App. 23). The Board concluded that the entire "web of circumstances" relied upon by the petitioner for its doubt of majority support "contains not a single thread of evidence that reflects * * * the sentiments of the employees themselves * * * on the question of union representation" (Pet. App. 23).

[3]The court agreed that the evidence did not indicate any employee sentiment against continued representation by the Union (Pet. App. 15). The court stated that, "while some of the evidence points to a decline in Union support within the bargaining unit," it "is ambiguous at best" and the "cumulative weight of all the evidence is not enough to rebut the presumption" (*ibid.*).

ARGUMENT

1. This case presents essentially the same legal question and factual circumstances that are presented in *Tahoe Nugget, Inc.* v. *National Labor Relations Board*, No. 78-1379, pending on petition for a writ of certiorari. Here, as in *Tahoe Nugget,* petitioner urges that the Board and the court of appeals improperly relied on petitioner's voluntary recognition of the Union to establish a presumption of continuing majority support (Pet. 15-16). Moreover, here as in *Tahoe Nugget,* petitioner claims that its initial voluntary recognition of the Union was unlawful and thus cannot support a presumption of continued majority status (Pet. 14-15). For the reasons stated in our Brief in Opposition to Petition in *Tahoe Nugget* at 7-11, petitioner's contentions are unavailing.[4]

a. The presumption of continuing majority status is based on the employer's voluntary recognition of the Union and not simply on membership in a multi-employer bargaining unit. Brief in Opposition to Petition in *Tahoe Nugget* at 7-8. There is thus no conflict between the decision in this case and the decision of the Sixth Circuit in *NLRB* v. *Richard W. Kaase Co.*, 346 F. 2d 24 (1965), as petitioner contends (Pet. 15-18). In *Kaase* the employer had not voluntarily recognized the Union; instead recognition was based on an election in a multi-employer unit where, although the Union received a majority of the votes in

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[4]We are sending petitioner a copy of our brief in opposition to the petition in *Tahoe Nugget.*

the entire unit, it could not be said that the Union received majority support from the employees of any individual employer.[5]

b. Petitioner's claim (Pet. 11, 14-15) that the presumption of majority status cannot be based on the initial voluntary recognition of the Union because that recognition was unlawful does not differ in substance from the similar claim in *Tahoe Nugget*.[6] For the reasons discussed in our Brief in Opposition in *Tahoe Nugget* at 8-11, any reliance by petitioner on its

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[5]Petitioner's reliance (Pet. 16) on *NLRB* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967), is also unwarranted. In that case, the court of appeals agreed with the Board that an employer member of a multi-employer bargaining group cannot lawfully refuse to bargain on the basis of a doubt as to the union's majority status among its own employees when the employer has not timely withdrawn from the multi-employer unit and that unit is still the appropriate unit for bargaining. 357 F. 2d at 248. As the Board pointed out in *Tahoe Nugget, supra*, 227 N.L.R.B. at 357 n.6, *Sheridan Creations was*

> grounded on the principle that the multi-employer unit, once established, remains the appropriate unit for all the employees and employers until lawfully disestablished or modified. These cases, therefore, say nothing about the presumption of majority status existing originally among the employees of each employer. Once an employer lawfully withdraws from the unit, of course, it is free to justify a withdrawal of recognition by successfuly rebutting the presumption.

[6]In *Tahoe Nugget*, the petitioner claimed that its initial recognition of the Union was unlawful because the Union lacked majority support at the time of recognition. Here, petitioner claims that its initial voluntary recognition was unlawful because it had no employees at that time as to whom majority support could be determined.

allegedly unlawful conduct in 1965 is time-barred by the six-months limitations period in Section 10(b) of the Act.[7]

2. Petitioner's additional contentions (Pet. 20-28) challenge only the agency's application of the facts of this case to determine that petitioner lacked a reasonably based, good-faith doubt of the Union's continuing majority status. Further review of these factual issues is unwarranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). There is ample evidence to support the Board's findings in this case. See note 2, *supra*.

a. Despite petitioner's claim (Pet. 22-23), it is evident that neither the court of appeals nor the Board failed to consider "the totality of the evidence." Both the Board (Pet. App. 23-24) and the court (Pet. App. 13-15) considered the record as a whole and concluded that petitioner's evidence, "standing alone or in its totality" (Pet. App. 24), failed to establish reasonable doubt of continued majority support for the Union.

b. Petitioner errs in assuming that the decision of the court of appeals requires "direct interrogation by an employer of his employees to determine actual union support * * * [in order to] rebut the presumption of majority status" (Pet. 21). The court did not reject petitioner's evidence of non-support because it was derived from sources other than employees. Rather, as the court noted (Pet. App. 14-15), the

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[7]As a result, any reliance by the court of appeals (see Pet. App. 11-12) on successive voluntary recognitions of the Union during the course of petitioner's membership in the Association was unnecessary. It was sufficient to hold, as the same court held in *Tahoe Nugget, supra*, 584 F. 2d at 304, that the claimed illegality of the initial recognition was time-barred.

statements relied on by petitioner were "offhand" and referred to "union membership in a general area and said nothing of an actual lack of union support at the Hotel." The court also observed that the few remarks by petitioner's employees that suggested a lack of Union support "came from only a small percentage of employees out of a work unit of 525 to 750 employees" (Pet. App. 14).[8]

c. Petitioner's concern that the rulings below will "thwart[] employee freedom of choice and majority rule" (Pet. 21) is misplaced. As the court of appeals recognized in *Tahoe Nugget, supra,* 584 F. 2d at 301 (footnote omitted), "[i]n refusing to bargain because of an alleged decline in union adherents, the employer is acting as vicarious champion of its employees, a role no one has asked it to assume." " 'The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.' " 584 F. 2d at 301 n.30, quoting *Brooks* v. *NLRB,* 348 U.S. 96, 103 (1954).

[8]Petitioner is also mistaken in its view (Pet. 21) that interrogation by the employer as to the employees' union support would be "unlawful" (Pet. 21). Such polling is lawful if it meets criteria designed to assuage employee fears of reprisal. *Struksnes Construction Co.,* 165 N.L.R.B. 1062 (1967). In *Burns International Security Services, Inc.* v. *NLRB,* 567 F. 2d 945 (10th Cir. 1977), on which petitioner relies (Pet. 22, 25-26), the court merely reversed the Board's finding that the poll there did not meet the *Struksnes* standards. 225 N.L.R.B. 271, 274 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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